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No.01-_____

In The
Supreme Court of the United States

BENITA SHVAUGHN HARRIS
Petitioner,

v.

COCA-COLA BOTTLING CO. CONSOLIDATED
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit's opinion below decided a federal question in a way that directly and plainly conflicts with the Supreme Court precedent set forth in *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000)?

PARTIES

All parties appear in the caption on the cover page. Petitioner, Shvaughn Harris, was employed formerly by Respondent, Coca-Cola Bottling Company Consolidated.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, whose mandate was entered in this proceeding August 16, 2001.

OPINIONS BELOW

The opinions of the court of appeals and the district court are unreported. Both opinions are reprinted herein in the Appendix.

JURISDICTION

Jurisdiction of this Court to review the decision of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C.§ 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-3 provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this subchatper.

STATEMENT

The Complaint of Benita Shvaughn Harris (herein after "Petitioner") challenged various actions by Respondent that deprived her of rights secured to her by Title VII of the

Civil Rights Act of 1964, as amended and 42 U.S.C. § 1981. After the district court granted the Respondent's motion for summary judgment, Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit Court of Appeals affirmed the judgment of the district court. The facts sets forth herein are taken from the joint appendix filed with the court of appeals.[1]

A. FACTS

Petitioner, an African-American woman, was discharged from her employment with Coca-Cola Bottling Company Consolidated (hereinafter "the Company") one day after she complained to the Company president about racially offensive conduct in the workplace. Prior to the events leading up to her termination, Petitioner had enjoyed consistently outstanding performance evaluations and promotions. (J. App. 433-43.)

In July 1996, the National Association for the Advancement of Colored People (NAACP) held its annual national convention in Charlotte, North Carolina, where it sponsored a job fair. At that time, Petitioner's primary responsibility was providing administrative and clerical support to then-Regional Manager Dave Brown, a white man, and Bob Pettus, also white, the Company's then-Vice President for Human Resources. (J.App. 28.) The Company requested Petitioner, among other employees, to represent it at one of the job fair's placement booths. (J. App. 83-85.)

The Sunday before the job fair, the Company ran an advertisement in *The Charlotte Observer* for the position of sales manager trainee. (J. App. 232.) Petitioner saw the ad and became concerned that it would cause a problem for the

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[1] Record references are as follows: the appendix to the petition is indicated as (App A or B. ___); and the Joint Appendix below is indicated as (J. App. ___).

Company because she believed that the parentheticals in the ad were offensive and degrading to African-Americans.[2] (J. App. 86-93, 100.) Other Coca-Cola ads contained no such parentheticals. (J. App. 340-59.) Petitioner discussed this with her husband and some friends, who agreed that the ad was insulting to African-Americans.

Petitioner met with Brown the following morning to express her dismay over the ad's implications. (J. App. 90.) Brown told her that his wife had also expressed concern over the content of the ad. (J. App. 90, 384.) During the next few days of the job fair, Petitioner discussed the ad with three or four colleagues. Brown also requested that she photocopy the ad so he could discuss it with Steve Hewitt, the Manager of Organizational Development and author of the ad. (J. App. 94-95.)

The following Monday, July 15, Brown summoned Petitioner to his office and informed her that he had received reports from staff that she was unapproachable and uncooperative. (J. App. 106-07.) This was the first time in her three years with the Company that Brown had criticized her. In fact, Brown has described Petitioner in a performance evaluation as a "team player." (J. App. 434.) Brown also told her that Hewitt was concerned about her soliciting employee opinions about whether the ad was

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[2] The ad read in pertinent part:

Opportunity Has Never Tasted Better

Sales Manager Trainees Coca-Cola Bottling Company Consolidated will be recruiting at the NAACP Job Fair for Sales Management Trainees. The successful candidates will have a Bachelor's degree and a minimum of 6-12 months sales or management experience. In addition, successful applicants will possesses excellent communication skills (i.e. listens attentively, uses proper grammar, gets point across, etc.), leadership traits (i.e. sets a good example, demonstrates initiative, maintains self-control under pressure) and a high degree of integrity, among other skills and abilities.

(App. B 27a.)

offensive to African-Americans. He told Petitioner that if she had time to "solicit" comments and poll employees about the ad, she obviously did not have enough work to do. (J. App. 168.)

The next day, he reprimanded Petitioner in writing for: (1) soliciting comments about the NAACP ad; (2) questioning a manager; and (3) not properly utilizing her time. He also told her that he was scheduling a team building session for all his employees. (J. App. 107.)

On July 22, 1996, Brown officially gave Petitioner the written reprimand he had informed her about the previous week. While stressing that it was not a corrective action, he specifically admonished her to discuss neither non-business related subjects nor the ad at work. For the first time, he also said that her work performance was not up to par. (J. App. 433-443.)

On August 5, Petitioner sent a reply memo to Brown that she copied to Pettus, the Company's Regional Vice-President. In it, she expressed displeasure that her efforts to alert the company to the concerns of African-Americans had been so terribly misconstrued. (J. App. 235.) She also questioned whether the Company's response to her concerns was retaliatory in nature.

Approximately three weeks later, on August 13, Brown again called Petitioner in to a conference, this time to express his contempt for the fact that she had copied her memo to Pettus. Petitioner was puzzled given the Company's explicit "open door" policy, which encourages any and all employees to discuss their concerns with any level of management. (J. App. 204-205.)

As these events unfolded, Petitioner began to suffer considerable anxiety because the terms and conditions of her work were starting to change for the worse. For example, although other administrative assistants routinely had access to the computer system, Petitioner's access was taken away.

After she complained it was only partially returned to her two months later. (J.App. 188.)

On August 26, 1996, she took her concerns to Bobbie Fritzen, the Company's Regional Human Resource Manager. (J. App. 128, 130.) Fritzen suggested a meeting to resolve some of the issues distressing Petitioner. At Fritzen's suggestion, Brown, Hewitt, and Petitioner met to discuss the problem. During the meeting, Hewitt lost his temper and told Petitioner that he had "gone against Jim Moore and the Norm Georges of the company to hire minorities." (J. App. 136.) These assertions about upper management's attitude toward people of color caused Petitioner to fear for her "promotablility" in the Company. (J. App. 136.)

September 6, 1996, Pettus informed Petitioner and Hewitt that all issues pertaining to the ad would be removed from their personnel files and destroyed if they agreed to put the incident behind them. (J. App. 177.) Petitioner agreed to do so if Hewitt would apologize. He refused.

At a follow-up meeting, Petitioner met with Pettus again to express concern about perceived racism in the Company, and her fear that she was being retaliated against for speaking up about the Company's need to be more sensitive to African-American employees. (J. App. 177.) She voiced her belief that she was professionally vulnerable because it appeared that minorities were not welcomed by upper management, and her suspicion that this was why she had been denied specific advancement opportunities in the past. She relayed to Pettus a number of illustrative anecdotes, including:

1. A supervisor in the mail room who talked about her cat named "nigger,"
2. Employees who remarked there were "too many niggers in the mail room," and;
3. Some employees who felt "customers just didn't want to deal/talk with niggers."

(J. App. 188, 191.)

Over a month later, Pettus summarized the meeting in a memo and asked her to identify specific phrases and actions that might be deemed racially offensive. (J. App. 147.) Although she responded on Oct. 29, 1996, (J. App. 224-25.) no other corrective efforts, including the promised team building sessions, were made by the company.

On November 13, Brown told Petitioner that he and Pettus had come up with some options for her: (1) stay in her current position and get part-time help with her clerical duties; (2) move to a field position in the Southern Division, provided one was available; (3) consider a position selling vending machines or fountains; or (4) transition out of the company, with company funded outplacement services and severance pay. (J. App. 151-153.) Mr. Brown also informed Petitioner that Mr. Hewitt was going to be promoted to another position. (J. App. 151.)

The next day, Petitioner sent an e-mail to Company President Jim Moore, with copies to Division Vice President Norm George, Chairman of the Board Frank Harrison III, Pettus, Fritzen, and Brown. (J. App. 237.) The e-mail read as follows:

> Mr. Moore: Dave Brown informed me yesterday that Steve Hewitt is being promoted to director. I'm outraged that CCBCC has seen fit to promote Steve. This is a man, who told me in a meeting with Dave Brown, that you and the "Norm George's of this Company did not want minorities here." He also told me that one of us did not need to be here and that he had a wife and family and that he needed his job and demanded that Dave Brown fire me because I brought to the Company's attention a job advertisement Steve placed in the Observer that African Americans considered insensitive and degrading. I had also informed Bobbie Fritzen and Bob Pettus of this matter and I cannot believe that

CCBCC would reward such outrageous behavior with a promotion.
Respectfully, Shvaughn Harris

On November 15, 1996, Brown fired Petitioner because, he said, she had refused to put the incidents surrounding the publication of the ad behind her and he could no longer trust her. (J.App.160-61.) The offered assurance of pay and out placement services were no longer available to her.

B. PROCEDINGS BELOW

Petitioner filed suit against Coca-Cola Bottling Company Consolidated seeking relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, and the common law of North Carolina. At the trial court level, Petitioner asserted claims for race discrimination in termination, race discrimination in discipline, hostile work environment, retaliatory hostile work environment, and retaliatory discharge. The United States District Court for the Western District of North Carolina, Charlotte Division, Judge Mullen presiding, held that there were no genuine issues of material fact and granted judgment to Respondent on all of Petitioner's claims as a matter of law. (AppB. 30a.) In making each of its determinations, the lower court credited Respondent's version of events over that of Petitioner and applied a higher standard of proof than is currently required under the law.

On appeal to the Fourth Circuit Court of Appeals, Petitioner maintained only her claims for retaliatory hostile work environment and retaliatory discharge. (AppA. 2a.) On August 16, 2001, the court of appeals affirmed the judgment of the trial court and incorporated its reasoning by express reference. (AppA. 5a.)

Petitioner prays that this Court issue the writ of certiorari because the court of appeals patently ignored Supreme Court precedent in adopting the decision of the trial court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Fourth Circuit's decision to affirm the district court's grant of summary judgment in favor of Respondent and to adopt the lower court's reasoning is plainly in contravention of this Court's decision in *Reeves v. Sanderson Plumbing*, 530 U.S., 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). *See e.g., Colorado v. Connelly*, 474 U.S. 1050, 106 S. Ct. 785, 88 L.Ed.2d 763 (1986) (granting certiorari where the lower court decision was in conflict with prior holdings of the Court).[3]

I. *Reeves* eliminated the "Pretext-Plus" Standard of Proof for Summary Judgment in Discrimination Cases.

The inferential proof doctrine for Title VII cases crafted in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981), attempts to address the reality that discrimination is not always overt and cannot always be proved by direct evidence of discriminatory intent.[4] As this Court has noted, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process."

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[3] Supreme Court Rule 10.1(c) instructs that a petition for writ of certiorari may be granted "when . . . a United States court of appeals has decided an important question of federal law . . . in a way in conflict with applicable decisions of this Court."

[4] *See* McGinley, Ann C., *¡Viva La Evolucion!: Recognizing Unconscious Motive In Title VII*, 9 Cornell J.L. & Pub. Pol'y 415 (2000).

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983).

Circuits utilizing the *McDonnell Douglas/Burdine* burden-shifting framework have not always been consistent in applying it. In response to this confusion, this Court, in *St. Mary's Honor Center v. Hicks*, attempted to settle the "divergent views" as to whether a factfinder's rejection of an employer's asserted legitimate nondiscriminatory reason mandates a finding for the plaintiff. *See Hicks*, 509 U.S. 502, 512, 113 S. Ct. 2742, 2751, 125 L.Ed.2d 407 (1993). This Court held that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by mendacity) may together with the elements of the prima facie case, suffice to show discrimination." *Id.* at 511. Justice Scalia, writing for the majority, further noted, "[n]othing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action not believable." *Id.* at 514.

Hicks did little to settle the question of whether a Title VII plaintiff must proffer additional evidence of intentional discrimination beyond her *prima facie* case when the employer's legitimate, nondiscriminatory reason is disbelieved. Circuits imposing a "pretext-plus" standard for summary judgment relied on *Hicks* to support their higher burden of proof. At the same time, circuits imposing "pretext only" standards also relied on *Hicks* for their support. *Compare*, *Vaughn v. MetraHealth Co. Inc.*, 145 F.3d 197 (4th Cir. 1998) (stating *Hicks* "teaches that to survive a motion for summary judgment . . . the plaintiff must do more than raise a jury question about the veracity of the employer's proffered justification"), with *Waldron v. SL Indus., Inc.*, 56 F.3d 491 (3rd Cir. 1995) (relying on *Hicks* for the proposition that disbelief of the employer's legitimate

nondiscriminatory reason, combined with a *prima facie* case, suffices to show intentional discrimination)).

In light of the continued confusion among the courts of appeals, this Court granted *certiorari* in *Reeves* to determine conclusively whether a plaintiff's *prima facie* case of discrimination combined with sufficient evidence of pretext is adequate to sustain a finding of liability for intentional discrimination. *See Reeves,* 530 U.S. at 140. In answer to this question, this Court held that the trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation, combined with the plaintiff's *prima facie* case. *See id.* at 147.[5]

Reeves establishes the quantum of proof required to survive a defendant's motion for summary judgment in inferential discrimination cases.[6] This Court reiterated the familiar maxim that, when reviewing a motion for summary judgment in a circumstantial discrimination case, the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh evidence." *Id.* at 150. Justice O'Connor further admonished that credibility determinations and weighing evidence are "jury functions, not those of a judge." *Ibid.* The Court instructed lower courts to "disregard all evidence favorable to the moving party that the jury is not

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[5] Justice O'Connor, writing for the unanimous Court, went on to note that such a showing will not always be sufficient to support a finding of liability. *See id.* at 148. "Certainly there will be instances where no rational factfinder could conclude that the action was discriminatory." *Ibid.* By way of example, the Justice notes that a defendant would be entitled to judgment as a matter of law if its offered reasons were a pretext for a different nondiscriminatory reason. *See ibid.*

[6] *Reeves* was decided in the context of a Rule 50 motion for judgment as a matter of law; however, the "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

required to believe." *Id.* at 151. That is, district courts must give credence "to the evidence favoring the nonmovant." *Ibid.*

Reeves holds that a trial court should deny defendant's motion for summary judgment when a plaintiff provides evidence of her *prima facie* case, and evidence that a reasonable jury is entitled to believe illustrating that the employer's nondiscriminatory reason was pretextual. *Reeves* admonishes further that lower courts should leave the business of drawing inferences and making credibility determinations to the jury.

II. The Decision of the Court of Appeals is Clearly Erroneous, and Conflicts With This Court's Precedent in *Reeves*.

In upholding the lower court's dismissal of this action, the Fourth Circuit neglected to apply either of the *Reeves* directives, both by failing to draw reasonable inferences in favor of Petitioner, and by utilizing the pre-*Reeves* pretext-plus standard for overcoming summary judgment in a *McDonnell Douglas* case.[7] The decision of the Fourth Circuit Court of Appeals explicitly incorporated the logic and reasoning of the district court without undertaking an independent legal analysis of its own.[8] Because the lower court applied an incorrect formulation of both the *McDonnell Douglas* framework and the summary judgment standard in general, the Fourth Circuit erred either in failing to remand the case for review in accordance with *Reeves*, or failing to reverse the lower court on the merits.

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[7] The court of appeals stated, "we conclude that the district court correctly decided the issues before it. Accordingly, we affirm substantially on the reasoning of the district court." (AppA. 5a.)

[8] The August 16, 2001 court of appeals decision is sufficiently subsequent to *Reeves'* June 12, 2000 date of decision to assume the court of appeals was aware of it.

A. The Trial Court Erred In Concluding That Petitioner Did Not Establish a *Prima Facie* Case of Retaliation.

First, in contravention of *Reeves* and basic principles of summary judgment law, the district court failed to view the facts in the light most favorable to Petitioner and refrain from making credibility determinations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). The lower court overstepped its bounds and invaded the territory of the factfinder in two ways: (1) by viewing Petitioner's conduct in a vacuum, ignoring some activity altogether, and unreasonably characterizing it as unprotected by Title VII, and (2) by accepting the Defendant's asserted nondiscriminatory reasons as true when there was evidence to the contrary.

The trial court below categorically determined that Petitioner's activities were not protected opposition activities.[9] (AppB. 26a-28a.) The district court decided that Petitioner had not engaged in opposition activity because her opposition to the *Observer Ad* was not unlawful under Title VII. (App.B 28a.) The trial court, however, failed to note, let alone consider, Petitioner's additional complaints of: (1) racial epithets being used in the work place, (2) statements that upper level management was opposed to promoting

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[9] Under Title VII, it is unlawful "for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by [by Title VII] or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *See* 42 U.S.C. §2000e-3(a).

minorities, (3) a lack of sensitivity to the needs of African-American employees, and (4) fear of reprisal for voicing these concerns. When these additional complaints are viewed along side Petitioner's opposition to the ad, it becomes clear that Petitioner was opposing what she reasonably believed to be a racially hostile work environment.[10] *See Demby v. Preston Trucking Co., Inc.*, 961 F. Supp. 863 (D. Md. 1997) (holding that an employee established *prima facie* case of hostile work environment where the employee recounted several incidents having racial animus at their core, including use of the word "nigger" by fellow employees, and an inadequate response by employer). Thus, while the trial court stated that Petitioner had only to demonstrate a reasonably objective belief that the opposed activity was unlawful, it failed to consider the totality of the circumstances that could reasonably give rise to such a belief. *See Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir. 1990).[11]

Further, the concerns Petitioner raised about the ad, coworkers' use of racially offensive language, statements of racial animus from Company officials toward hiring African Americans, and her "promotability," resulted finally in her termination. Thus, Petitioner was unlawfully discharged in retaliation for opposing conduct that she reasonably believed violated Title VII.

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[10] A racially hostile environment claim requires that the plaintiff show that her work environment was so pervaded by racial harassment as to alter the terms and conditions of her employment. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998).

[11] It should be noted, though, that it is far from clear that this is the correct standard. This Court, in *Clark County School Dist. v. Breeden*, specifically refused to decide whether an objectively reasonable, good faith belief that an incident constituted unlawful harassment is required as a part of the *prima facie* case of retaliation. *See* 532 U.S. 268, 121 S. Ct. 1508, 149 L.Ed.2d 509 (2001).

The lower court erred in not finding that Petitioner established a *prima facie* case of retaliatory discharge and harassment, by refusing to draw all reasonable inferences in favor of Petitioner and consider the totality of the events giving rise to her reasonable belief that she was being subjected to a racially hostile work environment.

B. The Court Erred in Applying the Pre-*Reeves* Pretext-Plus Standard of Review.

Moving forward to the next phase of the *McDonnell Douglas* framework, the trial court also erred by accepting the Company's nondiscriminatory reasons for retaliatory harassment and retaliatory discharge where there was contradictory evidence in the record sufficient to support a finding of pretext. The Company put forth three nondiscriminatory reasons for its decision: (1) Petitioner refused to put her differences with Hewitt behind her, (2) Brown lost his trust in Petitioner because she went directly to Moore, Harrison, and George with her opinions about Hewitt's promotion instead of coming to him first, and (3) Brown believed that the contents of her e-mail message were inaccurate and misleading. (AppB. 18a .) The district court incorrectly stated, "Plaintiff has no evidence that would create a disputed issue as to the legitimacy of Brown's reasons for terminating her." (AppB. 21a.)

To the contrary, the record indicates that Petitioner put forward sufficient evidence for a reasonable jury to find the Company's reasons were pretextual. First, the Court fails to note that Petitioner had a pristine work record prior to her initial complaint. Criticisms of her trustworthiness did not arise until immediately after she challenged the Company's commitment to its African American employees and to diversity in the workplace. As to Petitioner's alleged failure to put the Hewitt incident behind her, a jury would be

entitled to believe that the Company was more interested in stifling Petitioner than in her relationship with Hewitt. Surely the law does not limit an employee to one protest about discriminatory behavior and require her to remain silent if corrective action is not taken. The purpose of Title VII, to eliminate unlawful workplace discrimination, is circumvented if employees are limited to one complaint even in the face of retaliation. A jury could reasonably believe that Brown fired Petitioner because she protested a pattern of racism and utilized the Company's procedures for appealing decisions she believed to be unsatisfactory.

Brown's claim that he did not trust Petitioner could also be reasonably seen as pretext, given the express open door policy of the Company. It would not be a hard leap for a jury to doubt that Brown would terminate Petitioner for doing precisely what the Company policy manual encourages.

As to the the memo to George, the trial court repeatedly characterized it as a mere protest of Hewitt's promotion, where an equally reasonable interpretation of the memo would be to see it as another complaint about racial animus in the Company. The memo does not address only the promotion. Rather, it draws the president's attention to the insensitive ad and to Petitioner's concerns that he did not want minorities in the company. This e-mail could, thus, be aptly characterized as opposition speech, not mere disdain for Hewitt's promotion. A jury could clearly draw a conclusion of pretext from these factual inconsistencies.

It is apparent that the district court, and thus the Fourth Circuit, failed to "disregard all evidence favorable to the moving party that the jury is not required to believe . . . [and failed to] give credence to the evidence favoring the nonmovant." *Reeves*, 530 U.S. at 150-51. As this Court has admonished, "trial courts should act ... with caution in granting summary judgment [and should] deny summary judgment in a case where there is reason to believe that the

better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255. The district court below did not exercise caution. Rather, it chose to believe the Company when it was not permitted to do so. In so doing, it ignored this Court's precedent and plainly usurped the role of the jury.

More importantly, the district court's opinion is replete with pretext-plus language. From the outset the trial court operated under the incorrect standard stating, "the Plaintiff must come forward with evidence establishing that the Defendant's reasons are a pretext and that Defendant was, in fact, unlawfully motivated by the Plaintiff's race." (App.B 38a (emphasis added).) This is the very language Justice O'Connor deemed to be incorrect in *Reeves*. *See Reeves*, 530 U.S. at 146. The trial court further stated that Petitioner had failed to create an inference of discrimination because she failed to put forth affirmative evidence that "the real reason [for her termination] was race discrimination." (App.B 40a.) This language plainly indicates the lower court was applying the pretext-plus standard: requiring Petitioner to provide evidence of bad motive beyond the *prima facie* case to survive summary judgment. The Fourth Circuit ignored this Court's decision in *Reeves* by failing to, at least, remand this case for consideration in light of that decision.

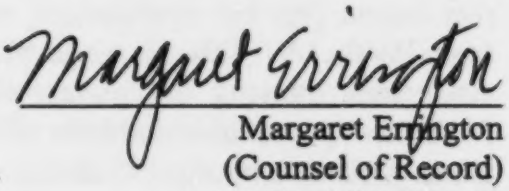
Given that the trial court erred both in finding that Petitioner did not engage in protected activity and in crediting the Company's nondiscriminatory reason, it becomes apparent that summary judgment was improperly granted. Petitioner has put forth evidence that she reasonably believed she was opposing unlawful acts. The record demonstrates evidence of retaliation, for example, in Petitioner's loss of computer access, being written up for bringing the ad to management's attention, and finally, being terminated. *See Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) (holding that an adverse employment action sufficient to support a Title VII retaliation claim includes any

retaliatory act or harassment that results in an adverse effect on the terms, conditions, or benefits of employment.) As such, *Reeves* mandates that summary judgment be denied. The Fourth Circuit erred by not either remanding the case for judgment in accordance with *Reeves* or reversing the summary judgment motion on the merits.

CONCLUSION

For the above reasons, a Write of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully Submitted,



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